IN THE

# Supreme Court of the United States.

OCTOBER TERM, 1891.

No. 335.

## The Oregon Railway and Navigation Company,

*Plaintiff in Error,*

*vs.*

## The Oregonian Railway Company, Limited,

*Defendant in Error.*

## Brief and Argument for Plaintiff in Error.

J. N. DOLPH,
*of Counsel for Plaintiff in Error.*

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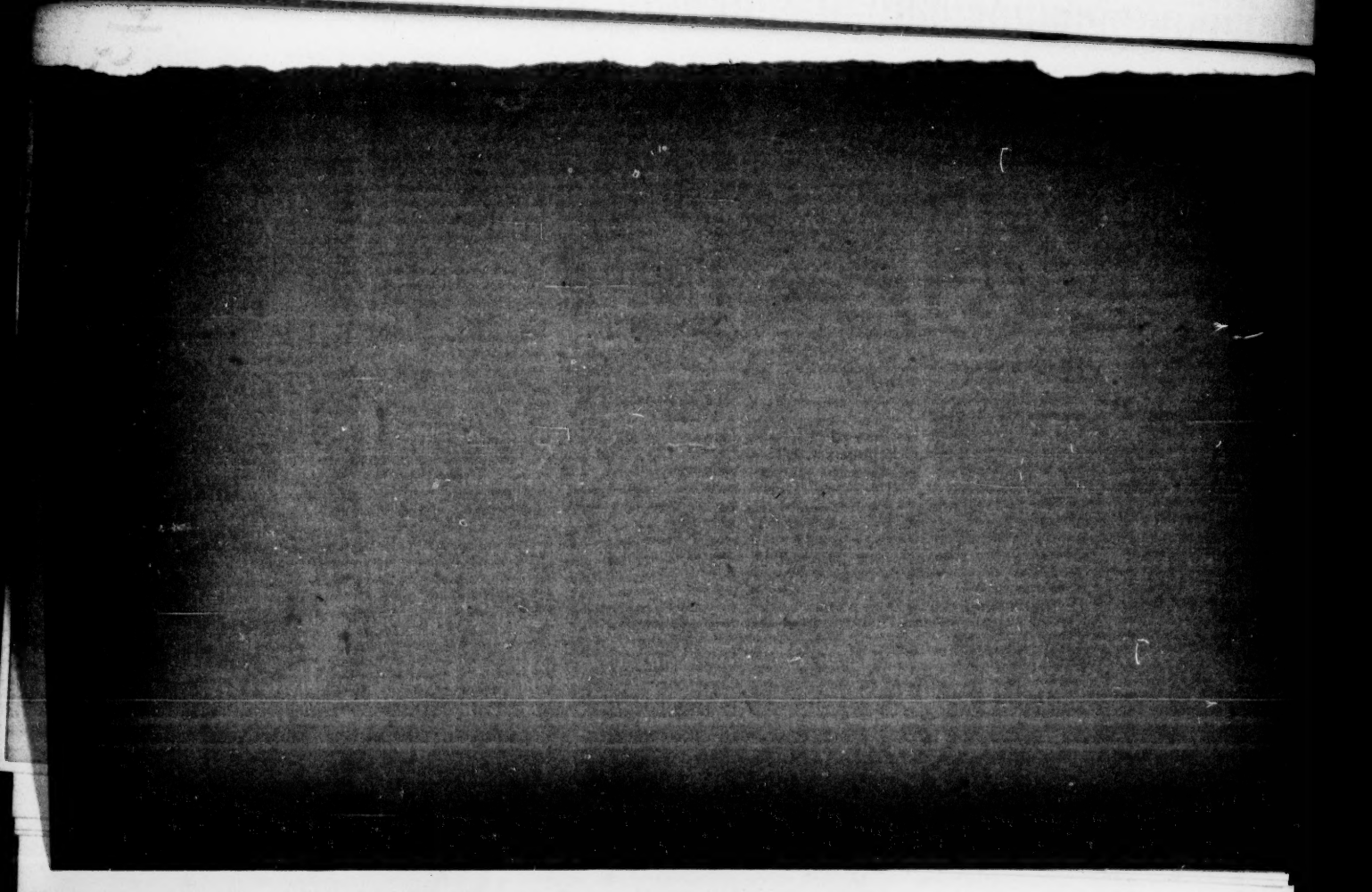

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THE OREGON RAILWAY AND NAVIGATION COMPANY, *Plaintiff in Error*,

*vs.*

THE OREGONIAN RAILWAY COMPANY, LIMITED, *Defendant in Error*.

No. 335.

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**In Error to the Circuit Court of the United States for the District of Oregon.**

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## Brief and Argument for Plaintiff in Error.

### STATEMENT.

Four actions, consolidated and tried as one, were brought by the Oregonian Railway Company, Limited, alleged to be a corporation formed in Great Britain under the Companies' Act of 1862, against the Oregon Railway and Navigation Company, a corporation formed under the general laws of Oregon, on the covenants in an indenture of lease, alleged to have been executed on August 1, 1881, by which the former company undertook to demise to the latter its railway in Oregon for the term of ninety-six years, upon a rental, to be paid in advance, in

semi-annual installments, of $68,131, on May 15 and November 11; being the same instrument which was held by this court, in Oregon Railway and Navigation Company *vs.* Oregonian Railway Company, Limited, (130 U. S., 1,) and in three other cases with the same title, (being Nos. 236, 237 and 238, October term, 1889,) to be void for want of power in the lessor to make a lease of its railroad, and for want of power in the lessee to take the lease. It will only be necessary to make such a statement of the facts as will show that the questions involved are the same as those passed upon by the court in the said case of Oregon Railway and Navigation Company *vs.* Oregonian Railway Company, Limited.

Each of said actions was brought to recover a semi-annual installment of rent alleged to be due on said lease. The pleadings and the proceedings in each case, prior to the consolidation, were substantially alike.

### The Complaints.

It is alleged in the complaints, which are almost identical, that at all times thereinafter stated plaintiff had been and then was a corporation under the laws of Great Britain and Ireland, organized under the act of Parliament commonly known as the "Companies' Act of 1862," and is a citizen of Great Britain and owner of a certain railroad in the State of Oregon, and has its principal office at Dundee, in Scotland.

That by section 6 of said "Companies' Act of 1862," it was and is provided that "any seven or more persons associated for any lawful purpose may, by subscribing their names to a memorandum of association and otherwise complying with the requisitions of this act in respect of registration, form an incorporated company, with or without limited liability."

That on or about the 30th day of April, A. D. 1880, more than seven persons did subscribe their names to a memorandum of association, and did otherwise comply with the requisitions of said "Companies' Act of 1862," in respect of registration, and did thereby form plaintiff an incorporated company, with limited liability.

That under the law of its creation and its memorandum of association plaintiff has power, among other things, to construct, own, operate, and lease railroads in Oregon, including the railroad and property thereinafter mentioned; that in said memorandum of association one of the objects of plaintiff's incorporation was declared to be "the building, constructing, reconstructing, equipping, owning, operating, leasing or selling, transferring or disposing of, or purchasing or otherwise acquiring, holding and operating, or otherwise using, working, or dealing in all or any such railway or railways, railroad or railroads, in the State of Oregon and the Territory of Washington, in the United States, or in either of them, or between such points in said State or Territory, or elsewhere in North America, as may *be* from time to time be resolved or determined upon by said company, and the carrying of passengers, goods, and minerals, and all other traffic and freight on, and the doing and performing of all other acts, deeds, and other operations connected with railways or railroads in the said State or Territory, or either of them, or elsewhere in North America," and that after its incorporation the State of Oregon recognized the plaintiff as duly incorporated and as having said powers, and did consent to the exercise of such powers within the State.

That the defendant was and is a corporation under the laws of Oregon, a citizen of that State, has its principal office at Portland, and by its articles of incorporation

took, and has power to operate and lease the said railroad and other property thereinafter mentioned, and that one of the objects of its incorporation was "to purchase or consolidate with, or lease or operate and maintain, on such terms as may be agreed upon," any railroad in Oregon.

That prior to the making of the indenture of lease mentioned plaintiff's board of directors passed a resolution authorizing its proper officers to sign and affix the seal of the company to such lease, and to acknowledge and deliver the same, and in like manner the board of directors of the defendant passed a resolution authorizing the proper officer of the defendant to sign, affix the corporate seal to, and acknowledge and deliver such indenture of lease, and that thereafter, as of the 1st day of August, A. D. 1881, said corporations, by their proper officers, signed, affixed their corporate seals to, acknowledged and delivered, each to the other, an indenture of lease, by which the plaintiff did demise and let to the defendant for the term of ninety-six years, from August 1, 1881, "the existing railroad," then owned by the plaintiff, and commonly known as the "narrow-gauge railroad," in the State of Oregon, together with certain equipments and appurtenances. That by said lease the plaintiff reserved and defendant covenanted to pay plaintiff an annual rental for said railroad and other property of twenty-eight thousand pounds sterling, in half-yearly payments of fourteen thousand pounds sterling each, on the 15th of May and 11th of November of each year, in advance. That defendant has refused to pay an installment of rent amounting to fourteen thousand pounds, equivalent to $68,131 in money of the United States, becoming due under the terms of said lease.

## The Answers.

By the answers the defendant denies that plaintiff at any time was or is a foreign corporation, or is incorporated at all under the Companies' Act of 1862, or under any law of Great Britain, or Ireland, or otherwise, or is a citizen of Great Britain, or is the owner of the railroad and property mentioned in the complaint, or has its principal or any office in Dundee, Scotland. Denies that at any time, any number of persons subscribed their names to a memorandum of association, or otherwise complied with the requirements of said Companies' Act of 1862, or did by any act, form plaintiff an incorporated company.

Denies that under any law or memorandum of association plaintiff took or acquired or had or has power to construct, own, operate, or lease the railroad mentioned in the complaint, or any railroad or other property in Oregon. Denies that the State of Oregon at any time recognized by law or otherwise plaintiff as a duly existing or incorporated foreign corporation, or as having any of the powers in the complaint mentioned, or consented to the exercise of such powers. Alleges that it has no knowledge or information sufficient to form a belief whether any pretended memorandum of plaintiff sets forth as an object or purpose of plaintiff's incorporation the things in the complaint specified, and that the laws of Great Britain, under which plaintiff pretends to be incorporated, require, among other things, that in the memorandum of association of companies incorporated thereunder "the objects for which the proposed company is to be established" shall be specified.

Denies that by its articles of incorporation, or otherwise, defendant took, or had, or has, power to lease the

railroad, or other property in the complaint mentioned, and alleges that the only road or roads which defendant was organized to own or operate, or which it ever had or has power to own or operate, and which are mentioned in its articles of incorporation, extend east from the city of Portland, Oregon, and do not include or form any near connection with the road alleged to have been demised to it, which lies wholly south of said city, the nearest point thereof being about thirty miles from said city, and that the whole of its capital stock was contributed and applied in the construction and equipment of its said roads. Denies knowledge or information sufficient to form a belief as to whether plaintiff's board of directors passed a resolution authorizing the execution of the lease. Denies that defendant's board of directors passed any resolution authorizing the execution of the lease. Denies that plaintiff and defendant, or either of them, agreed to execute the lease. Denies that the alleged indenture of lease was signed by the proper officers of the plaintiff or defendant, or that the corporate seal of either company was affixed by authority of the board of directors, or that the same was duly acknowledged by either plaintiff or defendant. Alleges that the pretended resolution of defendant's board of directors was passed by four directors at a special meeting, while the board consisted of eleven persons; that said meeting was not a regular or stated meeting, and no other resolution was passed authorizing the execution of said lease; that there were only four members of defendant's board present at said meeting, and that no notice of the object of said meeting was given to the members of the board. Denies that by any indenture of lease plaintiff demised to defendant for any term the property in the complaint mentioned. Alleges

that at the time of the pretended execution of said lease defendant's office was at Portland, Oregon; that Henry Villard, the president, and Trolins Tyndall, assistant secretary of defendant, acting solely upon said pretended resolution, and without authority from defendant, at the city of New York, signed said lease, and Tyndall affixed the corporate seal thereto; and that the stockholders have never approved the said acts of Villard and Tyndall, or the said pretended demise. Denies that by said pretended lease plaintiff reserved or defendant covenanted to pay the annual rental of twenty-eight thousand pounds sterling, or any sum whatsoever, or that any installment of rent at any time became due or payable to plaintiff from defendant, under the covenants of the lease or otherwise.

Admits that the defendant entered into possession of the property in the complaint mentioned about the time stated, and continued in possession until November 5, 1884, when it surrendered the possession to a receiver appointed upon the application of the plaintiff by the Circuit Court of the United States for the District of Oregon in a suit brought by the plaintiff against the defendant, and said road has been in the possession of such receiver during all the time for which rental is claimed by the plaintiff.

### Motion to Strike out Parts of Answer.

Plaintiff filed a motion to strike out separate portions of the answers on the ground that they were immaterial.

The following are the portions of the answers moved to be stricken out, viz:

"1. And as to the allegation in the complaint of the powers of which the plaintiff took or has, defendant alleges that the laws of Great Britain and Ireland, under

which plaintiff pretends to be incorporated, provide, with reference to corporations formed thereunder, that the memorandum of association and the articles of association, where such articles are required, shall set forth, among other things 'the objects for which the proposed company is to be establised,' and that upon compliance with the provisions of said laws, the subscribers to said memorandum and articles shall thereupon be a body corporate, capable of receiving all the functions of an incorporated company, having perpetual succession and a common seal, with power to hold land. And this defendant alleges that there is no other or further provision of the said laws relating to the powers of, or conferring powers upon corporations created or renting thereunder."

"2. And defendant as to the power which it took and has under its articles of incorporation, alleges that the only roads which it was organized to own or operate, or which it ever had or has power to own or operate, and which are mentioned in its articles of incorporation, extend east from the city of Portland, in Oregon, and between points in the eastern part of said State and Washington Territory, and do not include nor form any near connection with the said road or roads mentioned in the complaint, and therein alleged to have been demised to defendant; that said road or roads so alleged to have been demised, extend south from said city and between points wholly south thereof, and are distant from their nearest points about thirty miles from said city."

"3. And defendant further alleges that the whole of its capital stock was contributed for and applied in the construction and equipment of said roads, so mentioned in its articles of incorporation."

"4. That the stockholders of defendant did not at any time ratify, approve or conform the said acts of said Villard and Tyndale, or the said pretended demise."

"5. When (November 5, 1884,) it surrendered such possession (of the road) to a receiver appointed on the appli-

cation of the plaintiff by the Circuit Court of the United States for the District of Oregon, in a suit then pending therein brought by plaintiff against this defendant, and that said property has ever since remained, and now is in the possession of such receiver, and so was during all the time for which rental is claimed, to recover which this action is brought. That prior thereto defendant offered and was ever ready to restore such possession to plaintiff."

### Demurrers to the Answers.

The plaintiff also demurred to the following portions of the answers, the demurrers in all the cases being alike, namely:

"To all the portion of said answer wherein the defendant pleads to or denies the corporate existence or due incorporation and organization of plaintiff as a corporation, or facts relating thereto, or which pleads to or questions or denies compliance by plaintiff with foreign or domestic laws in the matter of plaintiff's incorporation and organization, or pleads to or denies, or attempts to plead to or deny, or question the powers, rights, privileges, or franchises or ownership of plaintiff alleged in said complaint, for the reason that the said defendant ought not to be allowed or heard to say or allege that the plaintiff is not a corporation, or has no power to make the contract herein sued on, or to make any denials contrary to defendant's own acknowledgment and deed of about August 1, 1881, as appears by the said complaint and admitted by the said answer thereto."

### Replies.

The plaintiff also at the same time replied—

1st. Denying the allegations in the answer, in effect that the resolution of defendant's board of directors authorizing the execution of the lease had been passed by less than a quorum of directors at a special meeting,

and that the execution of the lease by the president and assistant sscretary was without authority.

2d. Alleging that after the execution of the lease such execution was duly and fully ratifled by the defendant.

3d. Setting up the judgment of the Circuit Court of the United States for the District of Oregon, in the case of Oregon Railway and Navigation Company *vs.* Oregonian Railway Company, Limited, the same parties, which action was brought to recover a semi-annual installment of rent upon the covenants of the lease in question, but which had then been taken to the Supreme Court upon a writ of error, and the judgment in which was reversed by the court, and setting up other judgments of the United States Circuit Court rendered in plaintiff's favor in other actions brought upon the covenants of the lease, all since reversed by this court.

Defendant moved to strike out certain portions of the replies and demurred to other portions.

The court allowed the demurrers of the plaintiff to portions of the answers and the motions of plaintiff to strike out portions of the answers and disallowed defendant's demurrers to portions of the replies and overruled defendant's motions to strike out parts thereof.

The decisions of the court upon these demurrers and motions were based upon the propositions that the parties had power to execute the lease in question and that defendant was estopped to deny the power of plaintiff, to make the lease.

The four cases being now left for trial, mainly, if not wholly, upon the questions of fact arising on the replies of ratification, and prior adjudication were consolidated and submitted to and tried by the court, without the intervention of a jury. On February 20, 1888, findings of

fact and a conclusion of law were filed, and on the same day judgment was rendered in favor of the plaintiff for two hundred and ninety-four thousand, six hundred and eighty-nine dollars and twenty-five cents, and costs and disbursements.

The conclusion of law is in the following words:

"As a conclusion of law from the foregoing the court finds, that defendant is estopped to deny the powers, rights and privileges, franchises or ownership of plaintiff, alleged in the complaints in the present actions, or to deny the due execution by defendant and plaintiff of the said indenture of lease in said complaints mentioned, or to deny the making of the contract of leasing therein mentioned, or the form or effect thereof, or defendants covenants and promises therein contained; and that plaintiff is entitled to have and recover of, and from the defendant, said four sums of sixty-eight thousand, one hundred and thirty-one dollars, with interest thereon from the dates on which the same became due and payable, respectively, in all the sum of two hundred and ninety-four thousand, six hundred and eighty-nine dollars and twenty-five cents, lawful money of the United States together with the costs and disbursements of these actions to be taxed."

Upon the trial exceptions were taken by defendant and allowed by the court to the ruling of the court admitting testimony, and a bill of exceptions was allowed and signed by the judge.

But the motions to strike out parts of the answers, the demurrers to the answers and the conclusion of law found by the court upon the trial of the cause raised questions of law which are decisive of the case, and it is not necessary to consider the exceptions taken at the trial.

These questions which have been decided by this court adversely to defendant in error *are the precise questions*

*which were raised in the same manner in the action* between the same parties, decided by this court at the October term, 1887.

They are:

*First. Whether under the constitution and general laws of Oregon a corporation, organized under the laws of that State, could, at the date of the execution of the indenture of lease in question, take a lease of the railroad of another company and operate the same for ninety-nine years?*

*Second. Whether the laws of Oregon at said date conferred on a foreign corporation the right to make a lease of a railroad within the State for such a term?*

*Third. Whether under the facts of the case the lessee was estopped from setting up the want of power of the lessor to make such a lease, or of itself to take such a lease?*

The court below held, upon the motions to strike out parts of the answers, and upon the demurrers to portions of the answers, and upon the trial that—

*The defendant had power to take the lease.*

*That the plaintiff had power to make the lease; and*

*That the defendant was estopped to deny the power of the plaintiff to make the lease.*

## Assignment of Errors.

*First.* The court erred in sustaining the demurrers of the plaintiff to each portion of the answers demurred to.

*Second.* The court erred in allowing the motion of plaintiff to strike out portions of the answers.

*Third.* The court erred in holding that under the laws of Oregon the defendant had power to take the lease in the complaints mentioned.

*Fourth.* The court erred in holding that the plaintiff had power to make the lease.

*Fifth.* The court erred in finding as a conclusion of law that the defendant was estopped to deny the powers, rights, privileges, franchises or ownership of plaintiff alleged in the complaints, and to deny the due execution by defendant and plaintiff of the case in the said complaints mentioned, and to deny the making of the contract of leasing therein mentioned, or the form or effect thereof, or defendant's covenants and promises therein contained.

*Sixth.* The court erred in rendering judgment in favor of the plaintiff and against the defendant.

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## Brief and Argument.

In Oregon Railway and Navigation Company *vs.* Oregonian Company, Limited, (130 U. S., 1,) all the important questions involved in this case were decided by this court, and the lease upon the covenants of which recovery is sought in this case was held to be void. It was held (I quote from the syllabus) that:

"The constitution and general laws of Oregon do not authorize a railroad corporation, organized under the laws of the State, to take a lease of the railroad and franchise; that—

"The general laws of Oregon confer on a foreign corporation no right to make a lease of a railroad within the State, but only the right to construct or acquire and operate one there; and that—

"The operation of a railroad and payment of rent for three years by a lessee under a lease of it for ninety-six years, which was executed in violation of the corporate powers, both of the lessor and of the lessee, does not so far

execute the contract of lease by part performance as to estop the lessee from setting up its illegality in an action at law to recover after accruing rent."

The following, in which the questions involved in these cases are discussed, is copied from my brief in that case:

1. *Was the plaintiff in the court below authorized by its foreign charter or the laws of Oregon to enter into contract set up in the complaint?*

2. *Was the defendant in the court below authorized to enter into the contract set up in the complaint?*

3. *Did the act of the president and secretary of the Oregon Railway and Navigation Company, assuming to act for that company in signing the lease set up in the complaint, estop it from showing want of power in the lessor to execute said lease?*

4. *Is the Oregon Railway and Navigation Company, by the act of its president and secretary, in assuming to execute for it the lease set up in the complaint, estopped to deny that the hiring of said railroad was not within the scope of its corporate powers?*

These questions will be discussed in the order stated.

1. *Was the plaintiff in the court below, the Oregonian Railway Company, Limited, authorized by its foreign charter or the laws of Oregon to enter into the contract set up in the complaint?*

It is settled by the decisions of this court, that "unless specially authorized by its charter, or aided by some other legislative action, a railroad company cannot by lease or other contract turn over to another company, for a long period of time, its road and all its appurtenances, the use of its franchises, and the exercise of its powers, nor can any other railroad company without similar

authority make a contract to receive and operate such road, franchises, and property of the first corporation, and that such a contract is not among the ordinary powers of a railroad company, and is not to be presumed from the usual grant of powers in a railroad charter."

Penn'a Co. *vs.* St. Louis, Alton, &c., R. R., 118 U. S., 290.

Green Bay & Minnesota R. R. Co. *vs.* Union Steamboat Co., 107 U. S., 98.

Thomas *vs.* R. R. Co., 101 U. S., 71.

Pierce *vs.* Madison & Indianapolis R. R. Co., 21 How., 441.

New York & Md. Line R. R. Co. *vs.* Winans, 17 How., 30.

Laken *vs.* Railroad Co., 13 Oregon, 436.

See also Davis *vs.* Old Colony R. R. Co., 131 Mass., 258.

Eastern Counties Ry. *vs.* Hawkes, 5 H. S. Cas., 331, 371 to 381.

Ashbury Ry. Carriage & Iron Co. *vs.* Ritchie, L. R., 7 H. L., 653.

McGregor *vs.* Dover & Deal Ry., 12 Q. B., 618.

East Anglican Ry. *vs.* Eastern Counties Ry., 11 C. B., 757.

No such powers had been given to the parties to this transaction.

To ascertain whether the plaintiff had power, under its charter and the laws of Oregon, to make the contract in question, it is necessary to consider the provision contained in the constitution of the State concerning the formation of corporations, the provisions which have been made by law for the formation of domestic corpo-

rations, and for the transaction of business in the State by foreign corporations, incorporated for the purpose of constructing and operating railroads.

The constitution (Art. 2, Sec. 2,) provides:

"Corporations may be formed under general laws, but shall not be created by special laws, except for municipal purposes. All laws passed pursuant to this section may be altered, amended, or repealed, but not so as to impair or destroy any vested or corporate rights."

On October 11, 1862, the legislative assembly passed a general law providing for the formation of private corporations. Section 1 (see Code of 1874) provides that any three or more persons may incorporate themselves "for the purpose of engaging in lawful enterprise, business pursuit, or occupation," in the manner provided in section 2.

Section 2 provides that such persons, to become incorporated, shall make, subscribe, and file with the Secretary of State and the clerk of the county in which the business of the corporation is proposed to be carried on, written articles of incorporation; and section 4 provides: That "the articles of incorporation shall specify"— * * *

"2. The enterprise, business pursuit or occupation in which the corporation proposes to engage. * * *

"6. If the corporation is formed for the purpose of navigating any stream or other water, or making or constructing any railroad, macadamized road, plank road, clay road, canal, or bridge, the termini of such navigation, road, canal, or the site of such bridge."

Section 5, as amended in 1878, provides that—

"Upon making and filing the articles of incorporation, as herein provided, the persons subscribing the same are incorporators, and authorized to carry into effect the

objects specified in the articles in the manner provided in this chapter, and they and their successors, associates, and assigns, by the name assumed in such article, shall thereafter be deemed a body corporate, with power: * * *

"1. To sue and be sued. * * *

"4. To purchase, possess, and dispose of such real and personal property as may be necessary and convenient to carry into effect the objects of the incorporation, and to take, hold, and possess, and dispose of all real and personal property donated to such corporation by the United States, or by any State, Territory, country, city, or other municipal corporation, or any person, firm, association, or private corporation, for the purpose of aiding in the objects of such corporation." * * * *

Section 17 of said act, as amended in 1878, is as follows:

"All corporations that expire by the limitations specified in their articles of incorporation, or are dissolved by virtue of the provisions of Section 19 of this act, or are annulled by forfeiture or other cause, by a judgment of a court, continue to exist as bodies corporate for a period of five years thereafter, if necessary for the purpose of prosecuting or defending actions, suits, or proceedings by or against them, settling their business, disposing of their property, and dividing their capital stock, but not for the purpose of continuing their corporate business."

Section 19 is as follows:

"Any corporation organized under the provisions of this chapter may, at any meeting of the stockholders which is called for such purpose by a vote of the majority of the stock of such corporation, increase or diminish its capital stock or the amount of the shares thereof, or authorize the dissolution of such corporation and the settling of its business and disposing of its property, and dividing its capital stock in any manner it may see proper."

By an act approved October 21, 1878, entitled "An act

to authorize foreign corporations to do busines and exercise their corporate powers within the State of Oregon," the defendant in error claims to have been authorized to execute the lease in question. Said act consists of two sections, of which the following is a copy: *

"SEC. 1. That any foreign corporation incorporated for the purpose of *constructing, or constructing and operating, or for the purpose of or with the power of acquiring and operating any railway*, macadamized road, plank road, clay road, canal or bridge, or for the purpose of conducting water, gas, or other substance by means of pipes laid under the ground, shall, on compliance with the laws of this State for the regulation of foreign corporations transacting business therein, have *the same rights, powers and privileges in the exercise of the rights of eminent domain, collection of tolls, and other prerogative franchises* as are given by the laws of this State *for the purpose of constructing any railway*, macadamized road, plank road, clay road, canal, or bridge, or for the purpose of conducting water by means of pipes laid under the surface of the ground.†

"SEC. 2. Nothing in this act contained shall be so construed as to give to any foreign corporation or corporations any other or further rights, powers, or privileges than may be acquired or exercised by corporations incorporated under the laws of this State; but only so as to give to foreign corporations the same rights, powers, and privileges, on a compliance with the laws of this State, as may be acquired or exercised by corporations incorporated under the laws of this State."

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*This section was amended at the session of the Oregon Legislature, held in January, 1887, so as to authorize a railroad corporation to lease its road to another company. (See Session Laws of 1887, p. 14.) [A copy of the section as amended (the amendments being in italics) is printed as an Appendix hereto.]

†This act was amended at the session of the Oregon Legislature of January, 1887, so as to authorize a foreign corporation, specified in the act, to exercise the powers of a domestic corporation. (See Session Laws of 1887.) [A copy of the amendatory act (the amendments being in italics) is printed as an Appendix hereto.]

*Did this act confer on the Oregonian Railway Company, Limited, power to execute the contract set up in the complaint?*

That company is a foreign corporation organized, not for the purpose of transacting any business, or with power to transact any business, in the country where it claims to have been incorporated and organized, but in North America, and principally in the State of Oregon.

It is too well settled by the decisions of the courts of this country to require argument, that a corporation has no existence except in the country of its incorporation, but it may by comity be permitted to perform, through agents in other States, such ordinary and general business as individuals might perform. This comity may be denied them by the legislative power, and a foreign corporation, absolutely or under such conditions as the legislative power chooses to impose, may be prohibited from transacting business in such States. In the State of Oregon foreign corporations of the character mentioned in the act of October 21, 1878, are authorized (the act being constitutional) *to transact certain business*, and have conferred upon them *certain rights, powers, and privileges.* The enumeration of these rights, powers, and privileges in the act implies the *exclusion of all others.* The maxim *expressio unius, etc.*, is applicable.

*What are the foreign corporations embraced in this act?* They are those, and only those, incorporated for the purpose of "constructing," "constructing and operating," or for the purpose of "acquiring and operating," any railway or other road, &c., mentioned in the act. If the letting of a railroad, a single transaction, is a "*business pursuit or occupation*," within the meaning of section 4 of the Oregon act providing for the formation of private corporations, as was assumed by the court below, then

a corporation incorporated, among other things, for leasing its railroad when constructed is not authorized under that act to transact that portion of its business in the State of Oregon, because it is not included in, or necessary to the business of, "constructing," "constructing and operating," or "acquiring and operating" a railroad.

*What are the "rights, powers, and privileges" which such foreign corporations have under said act?* Not the same "rights, powers, and privileges" as domestic corporations formed for like purposes, as was assumed by the court below, but "the same rights, powers and privileges," *in the exercise of the rights of eminent domain, collection of tolls, and other * * * franchises,* as are given by the laws of the State to corporations organized within the State *for the purpose of "constructing" any railway,* &c. I omit the word "prerogative," because, if it has any meaning, it is used restrictively, and may be omitted without impairing the force of the argument. If we assume that the word "constructing," where it refers to domestic corporations, is equivalent to "constructing and operating," still the grant of powers is such only as are necessary to the exercise of the franchises mentioned.

In Morgan *vs.* Louisiana (73 U. S., 217) the court say:

"The franchises of a railroad corporation are rights or privileges which are essential to the operation of the corporation, and without which its road and works would be of little value; such as the franchise to run cars, to take tolls, to appropriate earth and gravel for the bed of its road, or water for its engines, and the like."

These are the franchises that are included in the expression, "other prerogative franchises," in this statute. The power to make a lease of its railroad is not necessary

to the enjoyment of these franchises, nor is it necessary to the business of the "constructing," "constructing and operating," or the "acquiring and operating" of a railroad.

The power to make a lease of its railroad in Oregon not being included in the business which foreign corporations are authorized by the act in question to transact in Oregon, and not being included in the powers, rights, and privileges conferred upon such corporations, because not necessary to the exercise of the franchises of such corporations, it follows that the making of the contract set up in the complaint by the Oregonian Company was prohibited by implication, and is illegal and void.

In Railroad Companies *vs.* Gaines (97 U. S., 697) a grant of "powers, rights, and privileges" was held to be thus restricted by the business the corporation was authorized to transact. The privilege of exemption from taxation had been granted to the Nashville and Chattanooga Railroad Company in its original charter. The court, in construing section 58 of the charter of the Knoxville and Charleston R. R. Co.—which is as follows:

"The said company is hereby invested, for the purpose of making and using said road, with *all the powers, rights, and privileges*, and subject to all the disabilities and restrictions that have been *conferred and imposed upon the Nashville and Chattanooga Railroad Company* in its original charter"—

said that the grant here was "*not of all the rights and privileges of the Nashville and Chattanooga Company, but of such as were necessary for the purpose of making and using the road*, or, in other words, the franchise of the company, which do not include immunity from taxation."

*But suppose, for the sake of argument, that by the act in*

*question there was conferred upon the Oregonian Railway Company, Limited, all the powers possessed by domestic corporations incorporated for like purposes, I still contend that it had no power or authority to let its railroad.*

*The power to make a lease of its railroad is not conferred upon a domestic railroad corporation by the general incorporation act of Oregon.*

"The powers of corporations organized under legislative statutes are such, and such only, as those statutes confer." * * *

"The charter of a corporation is the measure of its powers, and the enumeration of these powers implies the exclusion of all others."

Thomas *vs.* Ry. Co., 101 U. S., 71.

Marion Savings Bank *vs.* Dunkin, 54 Ala., 473, and cases cited.

It will not be claimed that any statute of the State expressly authorizes such a lease. The authority, if it exists at all, is found in subdivision 4 of section 5, or in sections 17 and 19 of the general law, hereinbefore set forth. Subdivision 4 of Section 5 empowers a corporation "to purchase, possess and dispose of such real and personal property as may be necessary and convenient to carry into effect the object of the corporation," etc. A corporation formed for the purpose of buying and selling goods would, probably, under this subdivision, have power to buy and sell such personal property at pleasure, because that would be necessary and convenient to carry into effect the object of its incorporation.

*Possibly* the same may be true in regard to a corporation formed for the purpose of dealing in real property. But *a railroad company incorporated under this act, as such,* would have power only to purchase and hold real or personal estate *necessary and convenient for the construction*

*and operation of its road;* and the better construction, I think, would be that it could *only sell it when no longer necessary for that purpose*, without complying with the provisions of section 19 of the act, which, as we shall hereafter see, contemplates a dissolution of the corporation when it disposes of its property.

In the case of Coe *vs.* Columbus, Piqua and Indiana R. R. Co. *et al.*, 10 Ohio State Repts., this precise question came before the Supreme Court of Ohio: A railroad company was authorized "to acquire and convey at pleasure all such real and personal estate as may be necessary and convenient to carry into effect the object of the corporation." The court held that "like any other general words they must be restrained into the general fitness of the matter, and that such language did not authorize the sale, mortgage, or lease of the real or personal estate which was necessary for the purpose of maintaining and operating the railroad.

But let us suppose, for the purposes of the argument, that this subdivision does confer the power upon a railroad company to dispose of all its property. Such a power could not be construed to authorize it to dispose of its property by leasing it to another company for a term of years, as that would be, as we shall see directly, clearly incompatible with the provisions of sections 16, 17, and 19 of the act.

The power of alienation conferred upon corporations by this subdivision is a power to dispose of *property*, as distinguished from *franchises*, and it may be admitted that the property the corporation is here authorized to dispose of, whatever that may be, may be sold, absolutely, or mortgaged, as a mortgage is only a qualified or conditional sale, but the question whether such power of dis-

position *authorizes a railroad company to make a lease of its railroad* will be discussed hereafter.

His Honor, Judge Deady, in his opinion, assuming that a railroad company may lease its property unless prohibited by some positive statutory enactment, says:

"The idea of such restraint is also incompatible with the provisions of the corporation act, section 18. That, in effect, authorizes a railroad corporation to terminate its existence at its option and dispose of its road."

Section 19 must have been intended. By reference to section 19 it will be seen that it authorizes a railroad corporation to dispose of its road only in connection with "the dissolution of such corporation and the settling of its business * * and dividing its capital stock." And section 17, as amended by the act of October 21, 1878, provides only that corporations "dissolved by virtue of section 19, * * annulled by forfeiture or other cause by judgment of a court, continue to exist * * for a period of five years thereafter, if necessary for the purpose * * of settling their business, disposing of their property, and dividing their capital stock.

These sections, so far from conferring authority upon an Oregon railroad corporation to let its road to another company for a period of ninety-six years, or for any other period, or being incompatible with the idea that such lease is unauthorized by the laws of the State, authorize, in my judgment, nothing but an absolute sale and transfer of the property of the corporation, so that, with the possession of the property, the transferee becomes the owner of the property and becomes subject to all the duties and liabilities toward the State, the public, and individuals which attach to the *ownership, possession,*

*operation, and management of such property when united in one person;* and said sections contemplate that such transfer shall be made contemporaneous with the dissolution of the corporation.

Besides, the transfer authorized by Section 19, and referred to in Section 17, can only be authorized at a stockholders' meeting, and then by vote of a majority of the stock of such corporation.

It is not pretended that such authority existed for the execution of the contract set forth in the complaint. On the contrary, it is expressly averred that it was not so authorized in the answer of the defendant.

So far, therefore, from Section 19 being incompatible with the idea that a domestic railroad corporation in Oregon does not possess power to dispose of its railroad and franchises by lease, it is, in itself, a denial of such power, because the circumstances under which and the manner by which the property of such a corporation may be disposed of are specified in the section, and such provisions are incompatible with the existence of power to lease its property for a term of years.

It follows that the power to execute a lease is denied to such a corporation unless conferred by some other express provision in the statute, which would overrule the otherwise controlling implication of the sections referred to.

The making of a special provision in this section for the disposition of the property of a corporation is inconsistent with the idea that power to dispose of all its property is conferred upon a railroad corporation by any other portion of the act.

The words "dispose of," in subdivision 4 of Section 5, *supra*, must be held to be equivalent only to the word

"sell," and cannot, by any fair construction, be held to authorize the execution of such contract as that which forms the subject-matter of this action—a contract by which a foreign corporation, domiciled in a foreign country, holding and operating a railroad in Oregon by permission of the State, leases its railroad and the franchises necessary to its operation for a period of ninety-six years, thus disabling itself from performing those functions which it had undertaken to perform, and retires with all its agents beyond the seas, but still remains the owner of the property and of the franchises granted to it upon consideration of their exercise.

A contract so obviously against public policy, see Thomas *vs.* R. R. Co., (101 U. S., 71,) unless expressly authorized by statute or by necessary implication, will not be enforced, and the authority to make it will not be implied from a grant of power to a corporation to sell property no longer necessary for the objects of its incorporation, or to dispose of all its property absolutely upon disincorporating and winding up its business.

The reasons for holding such a contract void on the ground of public policy do not exist in the case of an absolute sale, voluntary or involuntary, of all the property of such a corporation to another corporation formed under the same general law, as in the latter case the ownership of the property and the management of the same would be vested in the same corporation, with all the rights and powers and subject to all the liabilities of the former owner, *while the corporation disposing of the property by ceasing to transact business would cease to be a corporation* under the provisions of Section 16 of said act, which provides *that if any corporation organized under it shall "for any period of six months after the commencement*

*of its business neglect and cease to carry on the same, its corporate powers shall also cease.*"

The proposition that a domestic railroad corporation in Oregon may transfer all its property to another company by lease for a term of years, reserving an annual rent, cease to transact the business pursuit or occupation for which it was incorporated, and transact no business except the collection of rent for its property and the distribution of it in dividends to its stockholders, is incompatible with the provision of section 16 of the general incorporation law, quoted above, *which attempts to secure the due performance by the corporation of its functions in consideration of the grant of its franchises, and provides for a forfeiture of such franchises ipso facto whenever such corporation shall cease to exercise them for a period of six months.*

*But it is contended that the letting of its road is described in the articles of incorporation of the Oregonian Company as its business in part, and that by specifying in its articles the power to let its road as a portion of the business which it proposes to transact, it has acquired the power to do so.* Upon this point the learned judge who tried this cause in the court below fell into an error by confounding the *power* of a corporation to perform a single act (such as the execution of a lease by a railroad company transferring the control of its entire property for a term of years and thus *disabling itself from transacting the business* for which it was formed) with the *business* of a corporation as that term is used in section 1 and in subdivision 2 of section 4 of the Oregon law, *supra*.

In a broad sense, making a lease is business, but not such a business as is intended where the term is used in the Oregon act with reference to the enterprise, pursuit, or occupation in which a corporation proposes to engage.

Subdivision 2 of section 4, as we have seen, requires the corporators to state in their articles of incorporation "the enterprise, business pursuit, or occupation in which the corporation proposes to engage." Section 5 of said act enumerates the powers which all corporations, for whatever purpose incorporated, may exercise. The power of a corporation to dispose of its property must, as we have already seen, be found under sections 5 and 19 of the act.

By "business" under this law is meant the ultimate thing to be done in the exercise of the corporate franchises, such as "constructing" a railroad, "constructing and operating" a railroad, the business which foreign corporations are authorized to transact in Oregon by the act of October 21, 1878. The selling, mortgaging, transferring, or leasing a franchise to transact a business for which the corporation is formed cannot be the business of the corporation. The power to sell, mortgage, and lease is a matter wholly distinct from its business, by which is meant the ultimate end of its creation.

The object of requiring corporations to be formed under general laws is undoubtedly to prevent the granting of special favors to particular corporations, and to secure a uniformity of rights and powers in dealing with the corporate property. But if a corporation can acquire a special power not granted to all corporations under the general law by enumerating such power in its articles of incorporation as a business to be transacted, the object of the Constitution would be frustrated, and there would be, in the course of time, corporations with as diverse powers as exist where they are formed at will by private legislative acts and the measure of their power determined by the caprice of the legislative body.

*That the powers of an Oregon corporation are to be found only in the statute, and that there is no Oregon statute authorizing the lease of a railroad, has been decided by the Supreme Court of that State.*

In the case of Lakin *vs.* Railroad Company (13 Oregon, 436) the Supreme Court of Oregon held that a railway corporation, organized under the corporation law of that State, has no powers other than the statute confers and such as are incidental to its existence.

That case was an action to recover damages for personal injuries, resulting in death, alleged to have been caused by the negligence of the defendant and its agents. The defendant set up that at the time of the accident another company, the Oregon Pacific Railroad Company, was engaged in constructing the line of road mentioned in the complaint under a construction contract, and was still in possession of and operating the road. The court said:

"In this State the right to be incorporated is secured by a general law, and any persons may avail themselves of it by complying with its provisions. Under this general law the corporation, defendant, was organized, and possessed no other powers or functions than the statute creating it confers on such as are incidental to its existence. * * *

"It is regarded as settled that where one railroad company is authorized by law to contract or lease the road to another company, it is not responsible for the torts committed by the other company in the running of its trains or the management of its road. * * *

"It does not appear that the defendant had leased its road to the Oregon Pacific Company; and if it had, as there is no special statutory authority for it, the effect, as we have seen, would not have been to rid the defendant of its obligation to the public or to escape the liability for torts committed by such lease."

If, as I have attempted to show, a domestic railroad corporation, incorporated under the general incorporation laws of Oregon, is not authorized to let its railroad for a term of years, and cannot neglect for a period of six months to transact the business for which it was incorporated without losing its powers, then, although the foreign charter of the Oregonian Company may have contained the equivalent to a declaration that a part of the business of the company was to let its road, as it could exercise in Oregon no greater powers than a domestic railroad corporation, such declaration confers no power upon the corporation.

His Honor, Judge Deady, referring to the act, October 22, 1880, says:

"The effect of this act is clearly to establish, so far as the State and this court are concerned, the legal right of the plaintiff to construct, own, and operate this road, and, in my judgment, to dispose of it either absolutely or for a term of years."

In my judgment, an inspection of this act will show that such a construction of the act is wholly unwarranted, and that no such effect can be given to it. If the company was not in fact a corporation, as I shall undertake to show hereafter, the Legislative Assembly of Oregon could not by any enactment make it such, nor could it by a special law be authorized to exercise the franchises of domestic railroad corporations in fact, being prohibited by the constitutional provisions hereinbefore set forth. By the act in question the legislature of Oregon undertook to grant to the company "and to its assigns, and owners, and operators of the railway now being constructed by it," a public levee in the city of Portland, the

fee of which was held by the city, and certain rights of way upon the streets of Portland and over State lands.

*The act neither empowers the company to transfer its property or franchise, nor implies the existence of a present power to sell or assign*, but, recognizing the possibility of a change of ownership in the future, either under future legislation or by operation of law, undertakes simply to provide that, whoever does own or operate the road shall have the benefit of this grant.

To this end it is provided that the company and "its assigns shall have *no* power to sell, convey, or assign the premises or rights granted," * * * "save only with and as part and parcel of and as appurtenant to the railway now built and owned by said company and now in process of construction by it."

This language must be construed with reference to the subject-matter of the act and the manifest intention of the legislature. Examined in connection with its context and the subject-matter, it will be seen that the Legislative Assembly was not considering or legislating concerning the power of the company to transfer its road or property, but granting to it valuable rights, to be used for the public benefit, and attempting to prevent them being diverted from the object for which they were made.

The language quoted, instead of being intended as a *grant* of powers, was intended as a *prohibition* against the alienation of the property granted by the act, so that it should no longer be used for the purposes for which it was granted and the public thus be deprived of the benefit of the property. The act in this respect is not very dissimilar from the one relied upon for a like purpose in Thomas *vs.* Railroad Company (101 U. S., 71), and upon this point the language of Mr. Justice Miller in that case is in point.

Referring to an act of the State of New Jersey, providing that it should be "unlawful for the directors, lessees, or agents of said railroad (Milleville & Glassborough R. R. Co.) to charge more than three-and-a-half cents per mile for carrying passengers," etc., which was claimed to be a ratification of the lease of a railroad to said company, he said:

"The legislature was determined that whoever did run the road and exercise the franchise conferred on the company, and under whatever claim or right this was done, should be bound by the rates of fare established by the act. Hence, without undertaking to decide in whom was the right to the control of the road, language was used which included the directors, lessees, and agents of the road."

In Penn. Co. *vs.* St. Louis, Alton &c., R. R., *supra*, a statute of Indiana that provided that in cases where a railroad had been leased, conveyed, or mortgaged to another railroad company, and was in possession of such company, it should be assessed for taxation to that company, was held to neither imply that such leases were lawful nor that the lease was authorized by law.

But if the act under consideration could be construed into a grant of power to the Oregonian Company to "sell convey, or assign" its road, the power must still be exercised, if at all, *in the manner and subject to the conditions provided in the general incorporation law. A sale, conveyance, or assignment of all its property would be authorized only in connection with a surrender or forfeiture of its powers as a corporation.*

*Again, the power to sell and convey would not include the power to transfer all of its property by lease for a term of years,* as I have already attempted to show in considering the

power of alienation conferred upon domestic corporations by the general law.

*If it appeared that, by the act in question, the legislature of Oregon attempted to create the Oregonian Railway Company, Limited, a corporation, or to confer upon it corporate powers not already possessed under the general laws referred to, to that extent the act would be clearly unconstitutional and void.*

The constitution of California, so far as it relates to the formation of private corporations, is substantially the same as the constitution of Oregon. It provides that—

"Corporations may be formed under general laws, but shall not be created by special act except for municipal purposes."

In San Francisco *vs.* Spring Valley Water Works (48 Cal., 493) the Supreme Court of the State of California, in a well-considered and able opinion by Judge Crockett, held that under this constitutional provision the legislature could not confer upon private corporations any powers or grant them any privileges by special act. The court say:

"Nothing short of some imperative rule of constitutional construction could justify us in holding, at this late day, that, though corporations must be 'formed' under general laws, it is nevertheless competent for the legislature, by special grant, to confer upon a corporation once organized any powers, however extraordinary. We think, on the contrary, that no corporate rights or powers can be conferred by special grant, but must all be derived under general laws."

I am aware of the decision of this court in Wallace *vs.* Loomis (97 U. S. Reports, 146), in which it is held that a provision in the constitution of Alabama, which declares that—

"Corporations may be formed under general laws, but shall not be created by special act, except for municipal purposes,"

—did not prohibit the legislature from passing a special act changing the name of an existing railway corporation and authorizing it to purchase additional property.

But I think the power claimed for the Oregonian Company, under the Oregon act, is clearly distinguishable from the authority conferred by the act construed by the court in that case.

The power contended for by the Oregonian Company, under the Oregon act, is the power to do an act which, in the absence of statutory authority, would be against public policy, and void, while the power held to have been conferred by the Alabama act was not subject to this objection.

The authority conferred upon the Alabama corporation was that of acquiring additional railroad to be operated by its responsible owner, under the powers already possessed by the corporation, and subject to the liabilities already imposed by law upon it.

Mr. Justice Bradley, delivering the opinion of the court in that case, said:

"No new corporate powers or franchises were created."

Under the Oregon statute in question the power is claimed of enjoying all the privileges and franchises of a corporation by a body that has for ninety-six years deprived itself of all power to discharge the public duties and obligations that were the consideration upon which its privileges and franchises were granted, and that, too, although such power of dealing with corporate property is denied to corporations formed under the general laws —*a special, extraordinary corporate power.*

II. *Was the defendant in the court below authorized to enter into the contract set up in the complaint?*

Upon this point but little need be said in addition to what has already been said in discussing the power of the plaintiff in the court below to execute the contract.

1. If it is unlawful for a railroad corporation, under the laws of Oregon, to transfer its road and franchises by lease, it cannot be lawful for another railroad corporation to hire such railroad and franchises. In other words, the business of hiring a railroad cannot be lawful unless the business of letting it is also lawful.

2. As the general incorporation law of Oregon does not confer upon a domestic railroad corporation power to let its road, it does not authorize another railroad corporation to hire such railroad.

3. As the power to execute a lease transferring its railroad and franchises cannot be acquired by a railroad corporation under the Oregon law, by stating in its articles that leasing its railroad is part of the business it proposes to transact, the power cannot be acquired by a railroad corporation to take a lease of the railroad of another company by stating in its articles that the hiring and operating the road of another company is a part of its business.

4. If an Oregon railroad corporation, by stating in the specification of its business in its articles of incorporation that such business shall be, in part, to hire and operate the railroad of another company, can acquire the power to do so, the statement in the articles of incorporation of the Oregon Railway and Navigation Company are void, because too general and indefinite.

That statement is "to purchase and consolidate, or lease or operate and maintain, on such terms as may be agreed upon, any railway in Oregon," etc.

It is the obvious intent of the Oregon statute (subdivision 4, section 4) that every railroad enterprise to be conducted under that statute shall be identified by specifying the termini of the road. This clearly has not been done in the articles of incorporation of the Oregon Railway and Navigation Company.

III. *Did the act of the president and secretary of the Oregon Railway and Navigation Company, assuming to execute for that company the contract set up in the complaint, estop it from showing want of power in the lessor to execute said contract?*

The court below laid down the proposition, as I understand the opinion, that, although a contract of a corporation is unauthorized, but not in express terms prohibited by statute, or prohibited by the common law, and although unexecuted, the party with whom the contract was made is estopped to show the want of power in the corporation to make it. I do not think that such a distinction exists between contracts prohibited by statute or common law and contracts of a corporation not within the scope of its powers to perform for any purpose.

I claim to have shown that the execution of the contract set up in the complaint was *ultra vires* because it was a transaction not within the scope of the powers of either corporation to perform under any circumstances or for any purpose.

*In re* Comstock (3 Saw., 228) and in Semple *vs.* The Bank (5 Saw., 88) the court refused to enforce contracts made by a foreign corporation which had failed to exe-

cute a power of attorney, as required by statute, appointing an agent upon whom process could be served in suits against the corporation, and held that—

"No one is estopped to show that an act upon which a party claims a right is illegal because he was a party to it—even *in pari delicto*."

There is an unbroken line of decisions in the Federal and State courts of this country to the same effect.

An act is illegal when it is not according to law, and it may be of no validity and void when no law has been violated. A lack of power to make a binding contract is as fatal to the validity of a transaction as an express statutory prohibition, and there is no distinction in this respect between an act of a corporation prohibited by an express provision of law and one impliedly prohibited, because not within the express or implied powers granted by its charter.

See Rochester Insurance Co. *vs.* Martin, 13 Miss., 59.

The contract which forms the subject-matter of this action is an executory contract.

As was said by Mr. Justice Deady:

"This action is brought on a contract to pay rent in advance, and not for past use and occupation. The consideration for the covenant or promise to pay this installment of rent is not the past, but the future use of the property. The contract to pay is, therefore, executory; and the same may be said of every other installment of rent provided for in the contract."

The legal disability of a corporation to execute a contract is not, in my judgment, as was held by the court below, a defense personal to the party who is under it. The doctrine of *ultra vires* rests upon considerations

which affect the public. It is, as has been said, "a guard set over the prerogatives of the sovereign." A rule that the defense of *ultra vires* is a defense which cannot be taken advantage of by a party contracting with the corporation which has exceeded its powers, would remove all restraint upon the acts of corporations and enable them to make contracts not within the scope of their corporate powers with impunity. Under such a rule not only executed contracts not within the powers of the corporation must be permitted to stand, but unexecuted contracts would be enforced so long as the corporation chose to abide by its contract, and no longer.

The rule on this question of estoppel is thus stated in Morawetz on Private Corporations, § 86:

"If a contract entered into by a corporation was not authorized by its charter, then such contract may be avoided by either party, so long as it remains wholly unexecuted."

"A corporation cannot be compelled by legal process to do an act unauthorized by its charter." Id. § 87.

"If contracts between corporations and individuals are absolutely void because *ultra vires*, then this defense could be set up by the individual as well as the corporation; and where it would be greatly to the interest of the individual so to do, the corporation, though suffering great pecuniary loss thereby, could not avoid such a defense on the part of the other contracting party." (Wood's Field on Corporations, § 235.)

"Corporations cannot be rendered directly liable upon *ultra vires* transactions, but must account for benefits received therefrom. As long as the transaction remains executory, it is established that it cannot be enforced. But if it be executed, though in England it cannot be enforced or sued on, yet in the United States there seems

some doubt whether the corporation could be allowed to set up the defense of *ultra vires*. In both countries, however, unquestionably, the corporation must account for benefits derived." (Green's Brice's Ultra Vires, 42.)

"Any party to *ultra vires* transaction may set up the defense thereof, and any one corporator may call upon the courts to restrain the corporation from engaging therein." (Green's Brice's Ultra Vires, 42.)

In Marion Savings Bank *vs.* Duncan, (54 Ala., 473,) Stone, J., speaking for the court, said:

"In the case of the Pennsylvania Railroad Company, (21 Penn. State Rep., 22,) Chief Justice Black, delivering the opinion of the court said: 'When the State means to clothe a corporate body with a portion of her own sovereignty, and to disarm herself to that extent of the powers that belong to her, it is so easy to say that we will never believe it to be meant when it it not said.'

"Speaking further of the rule of construing the powers of a corporation he said: 'In the construction of a charter, to be in doubt is to be resolved; and every resolution which springs from the doubt is against the corporation.'"

"In the case of Grand Lodge of Ala. *vs.* Waddill, 36 Ala., 315, we quoted this language approvingly. Substantially the same idea was expressed in the following cases: State *vs.* Stebbins, 1 Stew., 308; State *vs.* Mayor and Aldermen of Mobile, 5 Por., 279; Mayor and Aldermen *vs.* Allaire, 14 Ala., 400; *ex-parte* Barnette, 30 Ala., 461.

"In the case of City Council of Montgomery *vs.* M. W. Plank Road Co., 31 Ala., 76, we affirmed the above principle, and went a step further, holding that a party dealing with a corporation in a matter not within the purview of its delegated powers does not thereby estop himself from setting up in defense the want of authority in the corporation to make the contract. The same doctrine was affirmed in the case of Grand Lodge *vs.* Waddill, *supra*.

"In such a case the doctrine of estoppel cannot be let to apply without clothing corporations with the ability to increase their powers indefinitely by sheer usurpation.

"Such contracts upon the part of a corporation are *ultra vires* and void; and no right of action can spring out of them."

In Lehman *vs.* Warner (61 Ala., 467) it was held that a corporation cannot enforce or be made liable on a contract it was without capacity to make; and if the contract was without the scope of its corporate powers, neither party is estopped from asserting its invalidity."

In Bradley *vs.* Bradley (55 Ills. 417) it was said by the court:

"While a contract remains executory it is perfectly true that the powers of the corporation cannot be extended beyond their proper limits for the purpose of enforcing a contract."

In Darst *vs.* Gale (83 Ills. 14) where it is held that a contract fully performed will be upheld, although where the contract remains unexecuted the corporation is not estopped to say it had not the power to make it, the court says, "it makes no difference in this respect whether it" (the defense of the *ultra vires*) "is interposed for or against a corporation."

In Rochester Insurance Co. *vs.* Martin (13 Minn. 59) it was held that powers not conferred on a corporation by the statute creating it are withheld and denied as much as if the legislature had used express negative language for that purpose, citing, Bank of Augusta *vs.* Earle (13 Pet. Rep. 588) and that a party who had contracted with a corporation organized under the general laws of Minnesota was not estopped from setting up that the plaintiff, when sued upon the contract, had no authority under its charter to make it.

In Farmers' and Mechanics' Bank *vs.* Baldwin (23 Minn.) and in Bank *vs.* Pearson (24 Minn.) the same rule was stated, and the defense of *ultra vires* was permitted to be set up against the corporation in actions brought by them to enforce contracts which their charters did not authorize them to make.

In the Bank of Michigan *vs.* Niles (Walker Chan., Mich., 99) specific performance was refused of a contract for the sale by the bank of certain real estate, made in excess of the bank's powers. This suit was brought by the bank, and the invalidity of the contract was therefore asserted by the other party.

Many other authorities might be cited to the same effect. The cases are numerous, and, with very few exceptions; will be found to be in harmony with the cases cited, and these few are cases in which the distinction was not properly drawn between the power of a corporation to perform the act in question for any purpose, and the power to perform it in the particular instance then under consideration.

IV. *Is the Oregon Railway and Navigation Company, by the act of its president and secretary in assuming to execute for it the contract set up in the complaint, estopped to deny that the hiring of said railroad was not within the scope of its corporate powers?*

The right of the plaintiff in error to set up as defense to the action its want of power to enter into said contract is unquestionable. Upon this point the court below (Deady, J.) held that: "In an action against a corporation on a contract made by it, the corporation is not

estopped to show that such contract was beyond its power to make."

Thomas *vs.* R. R. Co., 101 U. S., 71.

Ogdensburgh, &c., R. R. *vs.* Vermont and Canada R. R. Co., 4 Hun., N. Y. S. C., 712.

Middlesex R. R. Co. *vs.* Boston & Chelsea R. R., 115 Mass., 346.

Bradley *vs.* Belford, 55 Ills., 417.

Bigelow on Estoppel, 3d edition, 466; Wood's Field on Corporations, Sec. 386.

See also authorities cited to show that plaintiff in error is not estopped to deny that the execution of said contract was not within the corporate powers of the defendant in error.

If it shall be claimed that the pretended lease has been ratified by the stockholders of the defendant, it is a sufficient answer to such claim to say that it appears from the answer, and as the case now stands is admitted by the demurrer, that the pretended lease was not made with the consent of the defendant's stockholders; that it was not ratified by them, and that it was not made in their interest, nor so intended; that it was in violation of their rights; that it was a diversion of the money of defendant's stockholders to a purpose foreign from that for which it was subscribed and paid, and in which it was impossible they could have an interest; that it related to lines of road not contemplated in defendant's charter, and not possible for defendant legally to own or operate under that charter, and that plaintiff had full knowledge at the time of all these facts.

Again, if the execution of the lease was not within the

corporate powers of the lessee to perform for any purpose, it could not be ratified by its stockholders.

*Transactions not actually illegal* or ultra vires, *but not originally binding on a corporation, may be ratified by it; but transactions which are absolutely illegal* or ultra vires *cannot be ratified.* (Green's Brice's Ultra Vires, 550, and cases cited.)

Respectively submitted,

J. N. DOLPH,

*of Counsel for Plaintiff in Error.*

# APPENDIX.

AN ACT to amend Section 5, of Title 1, of Chapter 7, of the miscellaneous laws of Oregon, as amended by Section 1 of an act entitled "An act to amend Sections 5, 17 and 22, of Title 1, of Chapter 7, of the miscellaneous laws of Oregon, as compiled by Matthew P. Deady and Lafayette Lane," approved October 21, 1878.

*Be it enacted by the Legislative Assembly of the State of Oregon.* That section 5, of Title 1, of Chapter 7, of the miscellaneous laws of Oregon, as amended by Section 1 of an act entitled "An act to amend Sections 5, 17 and 22, of Title 1, of Chapter 7, of the miscellaneous laws of Oregon, as compiled by Matthew P. Deady and Lafayette Lane," approved October 21, 1878, be, and the same is hereby, amended so as to read as follows:

SECTION 5. Upon making and filing the articles of incorporation, as herein provided, the persons subscribing the same are incorporators and authorized to carry into effect the object specified in the articles in the manner provided in this chapter, and they and their successors, associates, and assigns by the name assumed in such article shall thereafter be deemed a body corporate with power: (1) to sue and be sued; (2) to contract and be contracted with; (3) to have and use a corporate seal, and the same to alter at pleasure; (4) to purchase, possess, and dispose of such real and personal property as may be necessary and convenient to carry into effect the objects of the incorporation, and to take, hold, and possess, and dispose of all real and personal property donated to such corporation by the United States, or by any State, Territory, county, city, or other municipal corporation, or by any person, firm, association, or private corporation for the purpose of aiding in the objects of such corporation; (5) to appoint such subordinate officers and agents as the business of the corpora-

tion may require, and prescribe their duties and compensation; (6) to make by-laws not inconsistent with any existing law for the sale of any portion of its stock for delinquent or unpaid assessments due thereon, which sale may be made without judgment or execution: *Provided*, That no such sale shall be made without thirty days' notice of time and place of sale in some newspaper in circulation in the neighborhood of such company for the transfer of its stock, for the management of its property, and for the general regulation of its affairs; (7) *in case the object or purpose for which any such corporation is incorporated is in whole or in part to construct, or construct and operate a railroad, to lease any part or all of its road to any other company incorporated for the purpose of maintaining and operating a railroad, and to lease or purchase, maintain and operate any part or all of any other railroad constructed by any other company, upon such terms and conditions as may be agreed upon between said companies, respectively. Any two or more railroad companies whose lines are connected may perfect any arrangement for their common benefit to assist and promote the object for which they were created: Provided, That nothing in this act shall be construed to authorize the leasing of any railroad line to any company or corporation owning a road which forms a competing or parallel line to its railroad.*

Received at the executive office at 8 p. m., February 10, 1887.

Filed in the office of the Secretary of State February 17, 1887, at 12:20 p. m.

NOTE.—The above act was presented to the Governor February 10, 1887, but was not returned by him to the Legislative Assembly, and became a law without his signature, by operation of section 15 of article V of the constitution.

An act to amend section 1 of an act entitled "An Act to Authorize Foreign Incorporations to do business and Exercise their Corporate Powers within the State of Oregon," approved October 21, 1878:

*Be it enacted by the Legislative Assembly of the State of Oregon*, That section 1 of an act entitled "An act to au-

thorize foreign incorporations to do business and exercise their corporate powers within the State of Oregon, approved October 21, 1878, be, and the same is hereby, amended so as to read as follows:

SECTION 1. That any foreign corporation incorporated for the purpose of constructing, or constructing and operating, or for the purpose of or with the power of acquiring and operating any railway, macadamized road, plank road, clay road, canal, or bridge, or for the purpose of conducting water, gas or other substance by means of pipes laid under *the* ground shall, on compliance with the laws of this State for the regulation of foreign corporations transacting business therein, have the same rights, powers, and privileges in the exercise of the rights of eminent domain, collection of tolls, and other prerogative franchises, *and in the control, management, and disposition of their business franchises and property as are possessed by corporations organized for similar purposes under the general incorporation laws of this State: Provided always, That in the case of the leasing of any line of railroad incorporated under the laws of this State by a foreign corporation, such leasing shall be upon the fundamental condition following, and not otherwise:*

*First. That such foreign corporation shall enter into an agreement in writing with the State of Oregon, duly executed by said corporation, to be signed by its president and attested by its secretary, which agreement shall be filed with the Secretary of State of the State of Oregon, whereby and wherein said foreign corporation shall agree that in all suits or actions by and between said foreign incorporation and a citizen or citizens of this State, during the continuance of such lease, shall be prosecuted or defended to a final determination in the courts constituted by the laws of this State, except in cases when such action or suit shall be commenced in or removed to the Federal courts by a citizen of this State, and upon the failure to comply with the terms of such agreement by such foreign corporation, such lease shall utterly determine and be rendered null and void at the option of the Legislative Assembly of the State of Oregon.*

*Second. That the State of Oregon reserves to itself through is (its) Legislative Assembly, and in such manner as it shall determine, the right, power, and authority to prescribe the rate to be*

*charged for the transportation of persons and property on such leased lines, and also to prescribe and make such police regulations for the government of such roads as it may from time to time determine.*

Received at the Executive Office at 8 p. m., February 10, 1887.

Filed in the office of the Secretary of State February 17, 1887, at 12:20 p. m.

NOTE.—The above act was presented to the Governor February 10, 1887, but was not returned by him to the Legislative Assembly, and became a law without his signature, by operation of section 15 of article V of the constitution.